

RECEIVED

DEC 20 2012

DEPARTMENT OF ECOLOGY  
OFFICE OF DIRECTOR

<input type="checkbox"/>	EXPEDITE (if filing within 5 court days of hearing)
<input checked="" type="checkbox"/>	No hearing is set.
<input type="checkbox"/>	Hearing is set:
	Date: _____
	Time: _____
	Judge/Calendar: _____

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

NATIONAL ELECTRICAL  
MANUFACTURERS ASSOCIATION, a  
non-profit trade association,

Petitioner,

v.

STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY,

Respondent.

No.

SUMMONS

TO THE DEFENDANT(S): A lawsuit has been started against you in the above entitled court by National Electrical Manufacturers Association ("NEMA"), plaintiff. Plaintiff's claim is stated in the written complaint, a copy of which is served upon you with this summons.

In order to defend against this lawsuit, you must respond to the complaint by stating your defense in writing, and serve a copy upon the person signing this summons within 20 days after the service of this summons, excluding the day of service, or a default judgment may be entered against you without notice. A default judgment is one where plaintiff is entitled to what he asks for because you have not responded. If you serve a notice of appearance on the undersigned person, you are entitled to notice before a default judgment may be entered.

You may demand that the plaintiff file this lawsuit with the court. If you do so, the demand must be in writing and must be served upon the person signing this summons.

1 Within 14 days after you serve demand, the plaintiff must file this lawsuit with the court,  
2 or the service on you of this summons and complaint will be void.

3 If you wish to seek the advice of an attorney in this matter, you should do so promptly so  
4 that your written response, if any, may be served on time.

5 This summons is issued pursuant to Rule 4 of the Superior Court Civil Rules of the State  
6 of Washington.

7 DATED this 19th day of December, 2012.

8 K&L GATES LLP

9  
10 By 

11 John Bjorkman, WSBA# 13426

12 Kari Vander Stoep, WSBA#

13 Marie Quasius, WSBA#

14 Attorneys for Petitioner National  
15 Electrical Manufacturers Association  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

☐ **EXPEDITE** (if filing within 5 court days of hearing)

☒ No hearing is set.

☐ Hearing is set:

Date: \_\_\_\_\_

Time: \_\_\_\_\_

Judge/Calendar: \_\_\_\_\_

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**

**IN AND FOR THURSTON COUNTY**

NATIONAL ELECTRICAL  
MANUFACTURERS ASSOCIATION, a  
non-profit trade association,

Petitioner,

v.

STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY,

Respondent.

No.

PETITION FOR JUDICIAL REVIEW  
AND FOR DECLARATORY  
JUDGMENT INVALIDATING  
CHAPTER 173-910 WAC

Petitioner alleges as follows:

**I. INTRODUCTION**

1. Petitioner seeks a declaratory judgment invalidating Chapter 173-910 WAC, because it creates a single funding mechanism for Washington's new product stewardship program for mercury-containing, energy-efficient fluorescent lights. The enabling statute, Chapter 70.275 RCW, requires two different funding mechanisms for the two different types of stewardship programs the statute authorizes: for the plan that a stewardship organization operates under contract to the Department of Ecology (the "Standard Plan"), each producer pays a fixed annual amount of \$15,000 (of which the

1 Department of Ecology retains \$5,000 for its administrative and enforcement costs); and,  
2 for the "independent" stewardship plan whereby a producer elects to opt out of the  
3 Standard Plan, the producer(s) must pay the full operating and administrative costs of their  
4 independent plan, plus pay the Department of Ecology a \$5,000 annual fee for its  
5 enforcement and administrative costs. Chapter 173-910 WAC ignores the fixed \$15,000  
6 fee and imposes an unlimited funding obligation on producers who participate in the  
7 Standard Plan.

## 8 II. PARTIES

9 2. Petitioner National Electrical Manufacturers Association ("NEMA") is a  
10 nonprofit trade organization whose member companies manufacture, among other  
11 electrical products, energy-efficient electrical lighting systems that include mercury-  
12 containing high-intensity discharge lamps, linear fluorescent lamps (the familiar elongated  
13 tube lamps widely used in retail, office and industrial applications) and compact  
14 fluorescent lamps ("CFLs").

15 3. NEMA's mailing address is 1300 N 17<sup>th</sup> Street, Suite 1752, Rosslyn, VA  
16 22209.

17 4. NEMA is represented by K&L Gates LLP, 925 Fourth Avenue, Suite 2900,  
18 Seattle, WA 98104, and John C. Bjorkman, Kari L. Vander Stoep, and Marie E. Quasius.

19 5. Respondent State of Washington Department of Ecology ("Ecology") is an  
20 administrative agency of the State of Washington and is responsible by law for  
21 promulgating and enforcing Chapter 173-910 WAC, the Mercury-containing Lights  
22 Product Stewardship Program rule (the "Rule").

23 6. Ecology's mailing address is 300 Desmond Drive SE, Lacey, Washington,  
24 98503.

1

2

- 4

## 7

8

## 10

11

12

17

22

1           12.     Energy-efficient fluorescent lamps must contain a small amount of mercury  
2 as a matter of technical necessity. Producers have evaluated substitute materials, but they  
3 do not produce the energy-savings that the small amount of mercury achieves.

4           **NEMA**

5           13.     NEMA and its members are committed to, and leaders in, environmental  
6 stewardship of products such as energy-efficient fluorescent lamps including: reduction  
7 and, where technically feasible, the elimination of use of toxic substances in products;  
8 labeling of products that contain toxic substances; and, end-of-life product management  
9 including collection, recycling, and safe disposal. See  
10 <http://www.nema.org/Policy/Environmental-Stewardship/Pages/default.aspx>. Over the  
11 past two decades, NEMA members have reduced the amount of mercury in energy-  
12 efficient fluorescent lighting by over 80% and in some fluorescent lamps up to 92%.  
13 [http://www.nema.org/Policy/Environmental-](http://www.nema.org/Policy/Environmental-Stewardship/Lamps/Documents/Lamp%20Industry%20Product%20Stewardship%20-%20A%20Record%20of%20Environmental%20Accomplishment%20-%20October%202012.pdf)  
14 [Stewardship/Lamps/Documents/Lamp%20Industry%20Product%20Stewardship%20-](http://www.nema.org/Policy/Environmental-Stewardship/Lamps/Documents/Lamp%20Industry%20Product%20Stewardship%20-%20A%20Record%20of%20Environmental%20Accomplishment%20-%20October%202012.pdf)  
15 [%20A%20Record%20of%20Environmental%20Accomplishment%20-%20October%2020](http://www.nema.org/Policy/Environmental-Stewardship/Lamps/Documents/Lamp%20Industry%20Product%20Stewardship%20-%20A%20Record%20of%20Environmental%20Accomplishment%20-%20October%202012.pdf)  
16 [12.pdf](http://www.nema.org/Policy/Environmental-Stewardship/Lamps/Documents/Lamp%20Industry%20Product%20Stewardship%20-%20A%20Record%20of%20Environmental%20Accomplishment%20-%20October%202012.pdf) For example, CFLs now typically contain less than 3 mg of mercury, an amount  
17 that will easily sit on the tip of a ballpoint pen.

18           14.     NEMA and its members support and participate in product stewardship  
19 programs throughout the United States.

20           15.     Among other activities such as providing a forum for the development of  
21 electrical product technical standards, NEMA has since 1926 advocated industry policies  
22 on legislative and regulatory matters at the federal and state levels.

23           16.     NEMA has regularly advocated at federal and state levels on legislative  
24 and regulatory matters related to environmental stewardship and end-of-life product  
25

1 management for electrical products such as mercury-containing energy-efficient  
2 fluorescent lamps.

3 17. NEMA took a direct and substantial advocacy role in the 2009 and 2010  
4 Washington legislative sessions with respect to the development of Washington's  
5 Mercury-containing Lights Product Stewardship law, Chapter 70.275 RCW, including  
6 advocating on the funding mechanism for the program.

7 18. Upon the enactment of Chapter 70.275 RCW, Respondent Ecology began a  
8 rule-making process and developed its Mercury-containing Lights Production Stewardship  
9 Program rules, Chapter 173-910, WAC (the "Rule").

10 19. NEMA took a direct and substantial advocacy role in 2011 and 2012 as  
11 Ecology developed the Rule, including but not limited to providing detailed comments on  
12 the draft Rule Ecology published in July 2012.

13 20. NEMA's member producers manufacture over 90% of the household  
14 mercury-containing energy-efficient lamps used in the United States and in Washington  
15 state.

16 21. Because of the violations alleged below, NEMA's members will be directly  
17 and substantially prejudiced by, among other things: the creation and obligation to fund  
18 and participate in an invalid product stewardship program funding mechanism; and, the  
19 prohibition against the sale of mercury-containing energy-efficient fluorescent lamps to  
20 Washington consumers unless NEMA's members fund and participate in an invalid  
21 product stewardship program funding mechanism.

22 22. NEMA and its members are "stakeholders" under RCW 70.275.020(23),  
23 and the APA required Ecology to consider their interests when developing the Rule.  
24  
25

1           23.     The declaratory judgment and other relief that NEMA prays for below will  
2 substantially eliminate or redress the prejudice NEMA and its members have or will suffer  
3 as a result of Ecology's violations described below.

4           24.     Further, the Rule is a matter of serious public importance, its  
5 implementation will immediately affect substantial segments of the population, and will  
6 have a direct bearing on commerce, finance, labor, or industry generally.

7           **Washington's Law on Mercury-containing Energy-Efficient Lights**

8           25.     In 2010, Governor Gregoire signed into law Engrossed Substitute Senate  
9 Bill ("ESSB") 5543, Chapter 130, Laws of Washington 2010, now codified at Chapter  
10 70.275 RCW (the "Law").

11          26.     The Law, among other things, creates the framework for a Washington  
12 end-of-life product stewardship program for certain mercury-containing energy-efficient  
13 lamps.

14          27.     RCW 70.275.030(2)(a) and (b) require producers of mercury-containing  
15 energy-efficient lamps sold in Washington either to:

16                 a)     "Participate in a product stewardship program approved by  
17 [Ecology] and operated by a product stewardship organization contracted by [Ecology]"  
18 (Ecology calls this the "Standard Plan"); or to,

19                 b)     Opt-out of the Standard Plan and "[f]inance and operate, either  
20 individually or jointly with other producers, a product stewardship program approved by  
21 [Ecology]" (the Law and Ecology call this an "independent plan")

22          28.     While the Law generally obligates producers to "fully finance" a product  
23 stewardship program, the Legislature created a discrete full-funding mechanism for the  
24 Standard Plan, including a fixed \$15,000 amount as each producer's share of the full cost  
25 of the Standard Plan, and a separate funding mechanism for any independent plans.

1           29. For the Standard Plan, “[e]ach producer shall pay fifteen thousand dollars  
2 to [Ecology] to contract for a product stewardship program to be operated by a product  
3 stewardship organization.” The Law allows Ecology to retain \$5,000 of each producer’s  
4 \$15,000 payment for administration and enforcement costs. RCW 70.275.050(2).

5           30. NEMA concedes that the Legislature intended this to be an annual fee for  
6 the continuing Standard Plan, rather than a one-time fee.

7           31. For an independent plan, “[a] producer or producers participating in an  
8 independent plan, as permitted under RCW 70.275.030(2)(b), must pay the full cost of  
9 operation.” Similarly, each such producer must also annually pay Ecology \$5,000 for  
10 administration and enforcement costs. RCW 70.275.050(3).

11           32. The Legislature intended the annual \$15,000 payment set out in RCW  
12 70.275.050(2) to be the full cost of the Standard Plan for each producer, while any  
13 producer choosing an independent plan is instead obligated to pay the full cost of such a  
14 plan, whatever that cost may be.

15           33. The Legislature confirmed in RCW 70.275.120 this annual \$15,000 cap on  
16 each producer’s share of the full cost of the Standard Plan, where the Legislature directs  
17 Ecology instead to prioritize the work if the fees collected are not adequate to do more:

18               a) With respect to the annual \$5,000 payments for administration and  
19 enforcement, “[a]ll producers shall pay [Ecology] annual fees to cover the cost of  
20 administering and enforcing this chapter.” RCW 70.275.120; however,

21               b) With respect to the Standard Plan, “[t]he department may prioritize  
22 the work to implement this chapter if fees are not adequate to fund all costs of the  
23 program.” RCW 70.275.120 (emphasis added). The Law defines “program” as the  
24 product stewardship program. RCW 70.275.020(16).  
25

1           34.     The legislative history of the Law further reflects the Legislature's intent to  
2 create an annual fixed \$15,000 cap on each producer's fee for the cost of the Standard  
3 Plan, and declined to provide Ecology with authority to adjust the annual fee for a  
4 Standard Plan if costs exceeded available revenues.

5           35.     ESSB 5443 was first introduced in the 2009 legislative session and, among  
6 other things, obligated producers selling mercury-containing energy-efficient fluorescent  
7 lamps, either individually or jointly, to operate their own product stewardship program  
8 and to finance the entire cost of the program.

9           36.     ESSB 5443 was re-introduced during the 2010 legislative session and  
10 underwent several changes. On February 5, 2010, the Senate Environment, Water, and  
11 Energy Committee amended ESSB 5443 to, among other things, limit a producer's fee to  
12 no more than \$10,000 for a plan in its first year of operation. After the first year, Ecology  
13 was to promulgate rules allowing the product stewardship organization managing the plan  
14 to raise the amount of the annual fee each producer pays if the cost of the program  
15 exceeded the total among of fees collected.

16           37.     On February 15, 2012, the Senate Rules Committee amended ESSB 5443  
17 and for the first time obligated Ecology to contract with a product stewardship  
18 organization to run a plan (now the Standard Plan). Further, the Senate Rules Committee  
19 eliminated the first-year \$10,000 cap on fees, and continued to obligate Ecology to  
20 promulgate rules that would allow the product stewardship organization managing the  
21 plan to raise the amount of the annual fee each producer pays if the cost of the program  
22 exceeded the total among of fees collected.

23           38.     On February 17, 2012, the House further amended ESSB 5443 to eliminate  
24 all provisions inconsistent with the fixed \$15,000 fee for the Standard Plan. The House:  
25 deleted the provision requiring that producers be "assessed a fee by the stewardship

1 organization to cover the cost of implementing the program;" and, deleted Ecology's  
2 authority to promulgate rules that would allow the product stewardship organization  
3 managing the plan "to adjust the fee above or below the limits provided in subsection (2)  
4 of this section should product stewardship program costs exceed available revenues."  
5 Instead, ESSB 5443 at this point contained the language that is now codified at RCW  
6 70.275.120 directing Ecology to prioritize the program work if the fees were not adequate  
7 to do more.

8 39. The Senate passed the amended House version of ESSB 5443 and  
9 Governor Gregoire signed it into law.

10 40. Before Governor Gregoire signed ESSB 5443 into law, Ecology admitted  
11 in correspondence that the fixed \$15,000 fee for the Standard Plan now codified at RCW  
12 70.275.050(2) is an annual payment and that fees referenced in RCW 70.275.120 are not  
13 separate from the fixed \$15,000 fee.

14 41. Ecology has commenced implementing the Law and has sent invoices to  
15 each producer totalling \$15,000. Ecology received payments from 29 producers, retaining  
16 \$5,000 from each producer for its administration and enforcement of the Law. In 2012,  
17 Ecology began drawing down from the \$290,000 available from these fees for operating  
18 the stewardship program to contract for the development of a Standard Plan.

19 **Ecology's Draft Rule and NEMA's Comments.**

20 42. The Law authorizes Ecology to adopt necessary rules, though nowhere  
21 does it expressly grant Ecology power to promulgate rules on financing of stewardship  
22 programs or to promulgate regulations inconsistent with the law.

23 43. Pursuant to RCW 34.05.320, on June 25, 2012, Ecology issued its notice of  
24 proposed rule making.  
25

1           44.     Without authority to promulgate any regulation on funding of programs,  
2     and rather than implement the Legislative directive of discrete funding mechanisms for  
3     the Standard Plan and for independent plans, Ecology created a single funding mechanism  
4     in its proposed rule.

5           45.     For the Standard Plan, rather than implement the annual fixed \$15,000 fee  
6     of RCW 70.275.050(2), Ecology obligated producers to pay all of the costs of whatever  
7     the product stewardship organization under contract to Ecology decided to spend, which  
8     will result in each producer paying well in excess of the fixed \$15,000 fee.

9           46.     In 2011, Ecology estimated that the cost of a stewardship program under  
10    the Law would cost three million dollars. In October 2012, Ecology was advised that the  
11    cost of a stewardship program under the Law would cost closer to \$1.5 million per year.  
12    At these costs, some producers will pay hundreds of thousands of dollars per year more  
13    than the \$15,000 fixed annual fee the Legislature decided upon, and the remaining  
14    producers will likely pay tens of thousands of dollars more than the \$15,000 fixed annual  
15    fee the Legislature decided upon.

16          47.     Because it did not implement the annual fixed \$15,000 fee for the Standard  
17    Plan, Ecology failed to propose a rule for how it may prioritize program work if the fees  
18    collected were not adequate to do more, as set out in RCW 70.275.120.

19          48.     NEMA timely filed its comments on the proposed Rule before the deadline  
20    of August 14, 2012.

21          49.     NEMA specifically commented on Ecology's failure to delineate clearly  
22    between funding for the Standard Plan and for independent plans, its failure to implement  
23    the annual fixed \$15,000 fee for the Standard Plan, and instead its imposition of unlimited  
24    financial responsibility on producers participating in the Standard Plan.  
25

1           50. NEMA further commented that Ecology had failed to “[c]larify how the  
2 department intends to ‘prioritize the work to implement this chapter if fees are not  
3 adequate to fund all costs of the program,’ if that should ever happen (RCW 70-275-  
4 120).”

5           **Ecology’s Final Rule**

6           51. On November 16, 2012, Ecology adopted its Final Rule, Chapter 173-910  
7 WAC.

8           52. Also on that date, Ecology published its Concise Explanatory Statement  
9 and response to comments as the APA requires. RCW 34.05.325(6)(a)(i) to (iii).

10          53. Ecology failed to respond to NEMA’s comment regarding the proposed  
11 Rule’s failure to describe how Ecology intends to prioritize the work to implement the  
12 Law if the fees collected are not adequate to do more.

13          54. The Final Rule makes no provision for how Ecology is to prioritize the  
14 work to implement the Law if the fees collected are not adequate to do more.

15          55. The Final Rule fails to implement the annual fixed \$15,000 fee for the full  
16 cost of the Standard Program.

17          56. The Final Rule instead obligates producers to pay unlimited amounts to  
18 fund a Standard Plan based upon whatever the stewardship organization under contract  
19 with Ecology chooses to spend.

20           **Ecology’s Request for Proposals**

21          57. On or about November 16, 2012, Ecology issued its Request for Proposals  
22 No. ECY RFP 1317 W2R (“RFP”) seeking proposals from stewardship organizations to  
23 enter into a contract with Ecology for the Standard Plan.

24          58. At section 1.3 of its RFP, Ecology explains that it has only approximately  
25 \$100,000 remaining from the funds that it collected from producers for the Standard Plan

1 pursuant to RCW 70.275.050(2), and that the successful bidder to the RFP is to collect  
2 funds for the ongoing implementation of the Standard Plan.

3 59. At section 3.2 of its RFP, Ecology directs the bidders to prepare proposals  
4 that include: (a) a determination of the cost of implementing the Standard Plan, including  
5 collection of funds from producers without reference to the annual fixed \$15,000 fee set  
6 out in RCW 70.275.050(2); (b) implement the Standard Plan with the funds collected;  
7 and, (c) submit updated plans and annual reports to Ecology.

8 60. The RFP contains no guidance to the bidders from Ecology on how to  
9 “prioritize the work to implement this chapter if fees are not adequate to fund all costs of  
10 the program” as set forth in RCW 70.225.120.

11 61. Responses to the RFP were due on December 7, 2012, and Ecology intends  
12 to award a contract to a product stewardship organization and to begin implementation of  
13 its Standard Plan on January 1, 2013.

14 62. After January 1, 2013, no producer may sell mercury-containing energy-  
15 efficient lamps in Washington state without compliance with Ecology’s invalid Rule.

16 **VI. PETITIONER’S REASONS FOR BELIEVING**  
17 **THAT RELIEF SHOULD BE GRANTED**

18 The Court should grant review and relief for the reasons set forth in Sections IV  
19 and V above, and because Ecology’s adoption of the Final Rule interferes with or impairs,  
20 or immediately threatens to interfere with or impair, the legal rights or privileges of the  
21 Petitioner and its members by compelling Petitioner’s members, under threat of fines and  
22 a prohibition from participation in the Washington market for mercury-containing energy-  
23 efficient lights, to comply with a funding mechanism that is unauthorized, unlawful,  
24  
25

1 arbitrary and capricious, and promulgated in violation of procedural requirements of the  
2 APA.

## 3 **VII. CAUSES OF ACTION**

### 4 **FIRST CAUSE OF ACTION – VIOLATION OF CHAPTER 70.275 RCW**

5 63. NEMA re-alleges each of the foregoing allegations as though fully set forth  
6 herein.

7 64. Ecology's Final Rule, as published on November 16, 2012, is invalid as it  
8 exceeds the statutory authority set out in Chapter 70.275 RCW in that, among other  
9 things:

10 a) the Rule creates a single funding mechanism for the Standard Plan  
11 and any independent plans, rather than discrete funding mechanisms as the Law requires;

12 b) the Rule imposes unlimited financial responsibility on producers  
13 participating in the Standard Plan, rather than implement the annual fixed \$15,000 fee as  
14 each producer's share of the full cost of the Standard Plan as the Law requires; and,

15 c) the Rule fails to establish how Ecology intends to "prioritize the  
16 work to implement [the Law] if fees are not adequate to fund all costs of the program," as  
17 set out in RCW 70.275.120.

18 65. Ecology is without authority to implement or enforce the Final Rule.

19 66. Ecology is without authority to accept the response to its RFP and to award  
20 a contract to a stewardship organization implementing or relying upon the RFP or the  
21 Final Rule.

### 22 **SECOND CAUSE OF ACTION – VIOLATION OF CHAPTER 34.05 RCW**

23 67. NEMA re-alleges each of the foregoing allegations as though fully set forth  
24 herein.  
25

1           68. Ecology's Final Rule, as published on November 16, 2012, is invalid as  
2 Ecology failed to follow the procedural requirements of the APA in its rule making,  
3 including but not limited to: Ecology failed both to summarize or to respond to all of  
4 NEMA's comments in its Concise Explanatory Statement, specifically, to "[c]larify how  
5 the department intends to 'prioritize the work to implement this chapter if fees are not  
6 adequate to fund all costs of the program,' if that should ever happen (RCW 70-275-  
7 120)," all in violation of RCW 34.05.325(6)(a)(i) to (iii).

8           69. Ecology is without authority to implement or enforce the Final Rule.

9           70. Ecology is without authority to accept the response to its RFP and to award  
10 a contract to a stewardship organization implementing or relying upon the RFP or the  
11 Final Rule.

### 12                   **THIRD CAUSE OF ACTION – DECLARATORY JUDGMENT**

13           71. NEMA re-alleges each of the foregoing allegations as though fully set forth  
14 herein.

15           72. As set forth above, and specifically as set forth in the First and Second  
16 Causes of Actions, there exists an actual and continuing justiciable controversy between  
17 NEMA and Ecology.

18           73. The dispute is not pending before any other court.

19           74. NEMA and Ecology have genuine and opposing interests which are direct  
20 and substantial.

21           75. As a result, a declaratory judgment is both necessary and proper in order to  
22 set forth and determine the rights, obligations, and liabilities that exist among the parties  
23 with respect to the Law and the validity of the Rule.

24           76. A judicial determination will be final and conclusive of the dispute.  
25

1           77.     NEMA, therefore, is entitled to a declaratory judgment that Chapter 173-  
2     910 WAC is invalid for the reasons set forth above and for other reasons that NEMA will  
3     prove a trial.

4                               **VIII. PRAYER FOR RELIEF**


5           WHEREFORE, Petitioner respectfully prays for the following relief:

- 6           1.     Entry of a declaratory judgment that Chapter 173-910 WAC is invalid;;
- 7           2.     Entry of a declaratory judgment that Ecology is without authority to  
8     implement or enforce Chapter 173-910 WAC;
- 9           3.     Entry of a declaratory judgment that Ecology is without authority to accept  
10    the response to its RFP and to award a contract to a stewardship organization  
11    implementing or relying upon the RFP or Chapter 173-910 WAC;
- 12          4.     Such other and further legal and equitable relief as may follow from the  
13    entry of a declaratory judgment;
- 14          5.     Entry of an injunction prohibiting Ecology from any further disbursements  
15    of funds remaining from its collection of money from producers pursuant to RCW  
16    70.275.050(2) to implement Chapter 173-910 WAC; and,
- 17          6.     Such other and further legal and equitable relief as this Court may deem  
18    necessary and proper.
- 19
- 20
- 21
- 22
- 23
- 24
- 25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

DATED this 19th day of December, 2012.

K&L GATES LLP

By   
John Bjorkman, WSBA# 13426  
Kari Vander Stoep, WSBA# 35923  
Marie Quasius, WSBA# 42285  
Attorneys for Petitioner National  
Electrical Manufacturers Association

# APPENDIX A

## Chapter 173-910 WAC

### MERCURY-CONTAINING LIGHTS PRODUCT STEWARDSHIP PROGRAM

#### GENERAL REQUIREMENTS

##### NEW SECTION

**WAC 173-910-010 Purpose.** (1) Washington state law requires establishment of a convenient and environmentally sound product stewardship program for mercury-containing lights throughout Washington state by January 1, 2013. Every producer of mercury-containing lights sold in or into Washington state for residential use must fully finance and participate in the product stewardship program. Such a system is essential to collect spent mercury lighting from covered entities which, when improperly disposed, releases mercury that threatens human health and the environment.

(2) This chapter implements Mercury-containing lights--Proper disposal, chapter 70.275 RCW.

(3) Washington state law established a statewide goal of recycling all end-of-life mercury-containing lights by 2020 through expanded public education, a uniform statewide requirement to recycle all mercury-containing lights, and the development of a comprehensive, safe, and convenient collection system that includes use of residential curbside collection programs, mail-back containers, increased support for household hazardous waste facilities, and a network of additional collection locations.

##### NEW SECTION

**WAC 173-910-020 Applicability.** This chapter applies to:

(1) Any producer of mercury-containing lights sold in or into Washington state, as defined in this chapter.

(2) A stewardship organization operating an approved product stewardship program under contract with the department.

(3) Any stewardship organization operating an approved product stewardship program for any producer or group of producers.

(4) Any covered entities as defined in this chapter.

(5) Collectors of mercury-containing lights including those participating in a product stewardship plan approved under this chapter.

(6) Transporters of mercury-containing lights participating in a product stewardship plan approved under this chapter.

(7) Processors of mercury-containing lights under a product stewardship plan approved under this chapter.

(8) Any retailer, electric utility, or other person that gives away, offers for sale, or sells mercury-containing lights in or into Washington state for residential use.

## DEFINITIONS

### NEW SECTION

**WAC 173-910-100 Definitions.** The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

**"Accumulation point"** means where mercury-containing lights from curbside or mail-back programs are accumulated for a product stewardship plan approved by the department.

**"Brand"** means a name, symbol, word, or mark that identifies a product, rather than its components, and attributes the product to the owner of the brand as the producer.

**"Collector"** means an entity that is licensed to do business in Washington state and that gathers mercury-containing lights from covered entities for the purpose of recycling under a product stewardship plan approved by the department and meets the collector requirements in WAC 173-910-520. Examples of collectors include, but are not limited to, drop off locations, household hazardous waste facilities, collection sites, curbside services, mail-back services, accumulation points, and collection events.

**"Compliance audit report"** means the report of a comprehensive third-party audit for each processing facility in the product stewardship program.

**"Covered entities"** means:

(a) A single-family or a multifamily household generator and persons that deliver no more than fifteen mercury-containing lights to registered collectors for a product stewardship program during a ninety-day period; and

(b) A single-family or a multifamily household generator and

persons that utilize a registered residential curbside collection program or a mail-back program for collection of mercury-containing lights and that discard no more than fifteen mercury-containing lights into those programs during a ninety-day period.

**"Department"** means the department of ecology.

**"Department's annual fee"** means the sum total of five thousand dollars paid to the department for each producer participating in a mercury-containing lights product stewardship program to fund department administration, oversight, and enforcement costs.

**"Distributor"** is an agent who supplies goods to stores and other businesses that sell to consumers.

**"Final disposition"** means the point beyond which no further processing takes place and materials from mercury-containing lights have been transformed for direct use as a feedstock in producing new products, or disposed of or managed in facilities that meet all applicable federal, state, and local requirements.

**"Fiscal growth factor"** means the average growth in state personal income for the prior ten fiscal years (chapter 43.135 RCW).

**"Fully finance and participate"** means the obligation of each producer of mercury-containing lights sold in or into Washington to fund its share of program costs and join in an approved product stewardship program.

**"Hazardous substances"** or **"hazardous materials"** means those substances or materials identified by rules adopted under chapter 70.105 RCW.

**"Independent plan"** means a plan for collecting, transporting, processing and recycling of mercury-containing lights that is approved by the department and developed and implemented by a producer, group of producers, or a stewardship organization designated by a producer or group of producers.

**"Mail-back program"** means the use of a prepaid postage container transported by the United States Postal Service or a common carrier, using sealable packaging and shipping materials that are designed to prevent the release of mercury into the environment by volatilization or any other means, to return mercury-containing lights for a product stewardship plan approved by the department.

**"Market share"** means the portion of mercury-containing lights sold in Washington state representing a producer's share of all mercury-containing lights products sold in Washington state.

**"Mercury-containing lights"** means lamps, bulbs, tubes, or other devices that contain mercury and provide functional illumination in homes, businesses, and outdoor stationary fixtures.

**"Person"** means a sole proprietorship, partnership, corporation, nonprofit corporation or organization, limited liability company, firm, association, cooperative, or other legal entity located within or outside Washington state.

**"Premium services"** means collection of mercury-containing lights through systems that may include additional fees to cover the collection costs not paid by the product stewardship program, examples include curbside collection or mail-back services.

**"Processing"** means storage and handling of mercury-containing lights for materials recovery, recycling, or preparing for final disposition. Processing must occur at facilities that meet all applicable federal, state, and local requirements.

**"Processor"** means an entity engaged in disassembling or dismantling mercury-containing lights to recover materials for recycling or disposal.

**"Producer"** means a person that meets any one of the following conditions:

(a) Has or had legal ownership of the brand, brand name, or cobrand of a mercury-containing light sold in or into Washington state, except for persons whose primary business is retail sales;

(b) Imports or has imported mercury-containing lights branded by a producer that meets the requirements of (a) of this definition and where that producer has no physical presence in the United States;

(c) If (a) and (b) of this definition do not apply, makes or made an unbranded mercury-containing light that is offered for sale or sold in or into Washington state; or

(d) Offers for sale, sells or has sold at wholesale or retail a mercury-containing light and does not have legal ownership of the brand but chooses to fulfill the responsibilities of the producer for that product.

**"Producer's share cost"** means each participating producer's share of the product stewardship program cost as determined by the stewardship organization. The program cost includes all administrative and operational costs, including the department's annual fee.

**"Product stewardship"** means a requirement for a producer of mercury-containing lights to manage and reduce adverse safety, health, and environmental impacts of the product throughout its life cycle, including financing and collecting, transporting, processing, recycling, and final disposition of mercury-containing lights.

**"Product stewardship plan" or "plan"** means a detailed plan describing the manner in which a product stewardship program will be implemented. A product stewardship plan can either be the standard plan or an independent plan.

**"Product stewardship program" or "program"** means the methods, systems, and services financed by producers of mercury-containing lights that addresses collecting, transporting, processing, recycling, and final disposition of mercury-containing lights generated by covered entities.

**"Recycling"** means transforming or remanufacturing mercury-containing lights into usable or marketable materials for use other than landfill disposal or incineration. Recycling does not include energy recovery or energy generation by means of combusting mercury-containing lights with or without other waste.

**"Reporting period"** means the period commencing January 1st and ending December 31st in the same calendar year.

**"Retailer"** means a person that offers mercury-containing lights for sale at retail through any means including, but not

limited to, remote offerings such as sales outlets, catalogs, or the internet, but does not include a sale that is a wholesale transaction with a distributor or a retailer.

**"Rural"** means areas without commercial centers or areas with widely dispersed population.

**"Service providers"** means collectors, transporters, and processors participating in a stewardship program.

**"Stakeholder"** means a person that may have an interest in or be affected by a product stewardship program.

**"Standard plan"** means the plan for the collection, transportation, processing and recycling of mercury-containing lights developed by a department-contracted stewardship organization in response to the department's request for proposals, approved by the department, and implemented by a stewardship organization under contract with the department.

**"Stewardship organization"** or **"organization"** means a producer or group of producers that operate a product stewardship program, an organization designated by a producer or group of producers to act as the agent on behalf of each producer to operate a product stewardship program, or an organization contracted by the department to operate a product stewardship program.

**"Transboundary"** means crossing a provincial, territorial, or national boundary or border.

**"Transporter"** means an entity that transports mercury-containing lights from collection sites, accumulation points, or collection services to processors or other locations for the purpose of recycling, but does not include any entity or person that hauls their own mercury-containing lights.

**"Wholesale"** means buying and selling goods, generally in original packages, on a large scale in parcels, usually from a manufacturer to a retail, commercial, or industrial client.

## **PRODUCER REQUIREMENTS**

### **NEW SECTION**

**WAC 173-910-210 Producers of mercury-containing lights.** (1) Beginning January 1, 2013, any producer of mercury-containing lights whose mercury-containing lights are offered for sale or sold in or into Washington state must fully finance and participate in a department-approved product stewardship program for mercury-containing lights.

(2) Each producer must participate in a product stewardship program by:

(a) Funding its producer share cost of the standard plan and program operated by the department-contracted stewardship organization; or

(b) Funding its producer share cost of and operating, either individually or jointly, an independent plan and program approved by the department.

(3) Producers must pay all administrative and operational costs associated with the standard program or the independent program in which they participate, except for the collection costs associated with curbside and mail-back collection programs. For curbside and mail-back programs, a stewardship organization must finance the costs of transporting and processing mercury-containing lights from the point of accumulation. For collection locations, including household hazardous waste facilities, charities, retailers, government recycling sites, or other suitable locations, a stewardship organization must finance the costs of collection, transportation, and processing of mercury-containing lights collected at the collection locations.

(4) The producer must satisfy the following requirements:

(a) Submit data to the department or stewardship organization to enable a reasonable estimate to be determined of each producer's share cost of the mercury-containing lights product stewardship program;

(b) Submit market share data to the department to determine market share in the event more than one approved product stewardship plan is operating;

(c) Meet its financial obligations to the plan, which includes the department's annual fee;

(d) Comply with producers' requirements as described in the plan;

(e) Participate in a fully implemented plan; and

(f) Take actions required to correct violations.

#### NEW SECTION

**WAC 173-910-220 Producer violation and warning.** (1) There are three types of producer violations:

(a) Participation violation for not participating in an approved product stewardship plan.

(b) Implementation violation for not implementing an approved product stewardship plan.

(c) Plan/report violation for not submitting a product stewardship plan, plan update, or annual report.

(2) Department issued warning letters will:

(a) Be issued for any of the three producer violations, except that a penalty will be issued for a first implementation violation concurrent with a warning letter.

(b) Be sent to the producer by certified mail.

(c) Include a copy of the requirements to let the producer

know what they must do to be in compliance with this chapter.

(d) Include the time period within which the producer must be in compliance in order to not incur a penalty.

NEW SECTION

**WAC 173-910-230 Producer violation notices and penalties.**

**Table 200**  
**Producer Violation Notices and Penalties**

<b>Notice</b>	<b>Participation Violation</b> <i>Failure to participate in an approved plan</i>	<b>Implementation Violation</b> <i>Failure to implement an approved plan</i>	<b>Plan/Report Violation</b> <i>Failure to submit plan, update plan, change plan or submit annual report</i>
First Violation Notice	Warning letter to participate within 60 days	Automatic penalty of up to \$5,000, plus warning letter regarding subsequent penalties	Warning letter to comply within 60 days
Second Violation Notice	Penalty of up to \$1,000 per day starting 60 days after receipt of warning letter	Penalty of up to \$10,000 for each 30 days of noncompliance starting 30 days after receipt of warning letter	Penalty of up to \$10,000 per day starting 60 days after receipt of warning letter
If Compliance is Achieved Within 30 Days of Second Violation Notice	Penalty reduced by 50% if compliance is achieved by day 90	Penalty reduced by 50% if compliance is achieved by day 30	Penalty reduced by 50% if compliance is achieved by day 90
Third Violation and Subsequent Notices	Penalty of up to \$1,000 per day for every day of noncompliance to be issued every 60 days	Penalty of up to \$10,000 for every 30 days of noncompliance to be issued every 30 days	Penalty of up to \$10,000 per day for every 30 days of noncompliance to be issued every 30 days

(1) **Participation penalties** apply to producers not participating in an approved product stewardship plan.

(a) Producers selling mercury-containing lights in or into the state for residential use that are not participating in an approved product stewardship plan will receive a warning letter, or first violation notice, to participate in an approved plan within sixty days or incur penalties. The warning letter will include compliance requirements and notification that the requirements must be met within sixty days.

(b) Producers not participating in an approved product stewardship plan that continue to sell mercury-containing lights in or into the state for residential use sixty days after receiving the warning letter will receive a penalty, or second violation notice, of up to one thousand dollars for each violation; a violation is one day of noncompliance.

(c) Penalties will be reduced by fifty percent if the producer

meets the compliance requirements within thirty days of the second violation notice.

(d) Producers that continue to not participate in an approved product stewardship plan will receive penalties of up to one thousand dollars per day of noncompliance starting from the date of the second violation notice. This penalty will be issued after each subsequent period of sixty days of noncompliance.

(2) **Implementation penalties** apply to producers that fail to implement their approved product stewardship plan.

(a) Producers not implementing an approved product stewardship plan will receive a penalty for the first violation of up to five thousand dollars, plus a warning letter to implement its approved plan within thirty days or incur additional penalties. The warning letter will include compliance requirements and notification that the requirements must be met within thirty days.

(b) Producers that fail to implement their product stewardship plan will receive a penalty, or second violation notice, of up to ten thousand dollars for the thirty days of noncompliance.

(c) Penalties will be reduced by fifty percent if the producer meets the compliance requirements within thirty days of the second violation notice.

(d) Producers that continue to fail to implement their product stewardship plan will receive penalties of up to ten thousand dollars for each subsequent thirty days of noncompliance.

(3) **Plan/report penalties** apply to producers that fail to submit a product stewardship plan, update, or change the plan when required, or fail to submit an annual report.

(a) Producers not submitting the plan, plan update, or report will receive a warning letter, or first violation notice, to submit the plan or report within sixty days or incur penalties. The warning letter will include compliance requirements and notification that the requirements must be met within sixty days.

(b) Producers that fail to submit the plan, plan update, or report will receive a penalty, or second violation notice, of up to ten thousand dollars for each violation; a violation is one day of noncompliance starting with the first day of notice of noncompliance.

(c) Penalties will be reduced by fifty percent if the producer meets the compliance requirements within thirty days of the second violation notice.

(d) Producers that continue to fail to submit the plan, plan update, or report will receive penalties of up to ten thousand dollars per day issued after each subsequent period of thirty days of noncompliance.

(4) The department will deposit all penalties collected under this section into the mercury-containing lights recycling account created under chapter 70.275 RCW.

(5) To correct a violation the producer must:

(a) Meet the compliance requirements in the warning or penalty letter from the department; and

(b) Pay any penalties due to the department.

(6) Penalties applied to the stewardship organization in WAC

173-910-340 for the same violation will not be applied to producers.

(7) Penalties may be appealed to the pollution control hearings board, pursuant to chapter 43.21B RCW.

## **STEWARDSHIP ORGANIZATION REQUIREMENTS**

### NEW SECTION

#### **WAC 173-910-310 Stewardship organization requirements. (1)**

The department-contracted stewardship organization will implement the department-approved standard plan and independent stewardship organizations will implement department-approved independent plans.

(2) Stewardship organizations will:

(a) Estimate the total program cost for the coming year, including the department's annual fee for all participating producers;

(i) The department's annual fee for each stewardship organization is the sum total of five thousand dollars paid to the department for each producer participating in the stewardship program.

(ii) The department's annual fee for the department-contracted standard plan will be adjusted by the annual fiscal growth factor calculated under chapter 43.135 RCW.

(iii) For implementation of the fiscal growth factor, the base year for all mercury-containing lights department annual fees will be fiscal year 2011 ending June 30, 2011. In the base year, the fiscal growth factor will be zero.

(b) Determine the producer share cost based on market share or other equitable formula for program costs for each participating producer, including their share of the department's annual fee;

(c) Submit the program cost and producer share cost to the department for review, adjustment, and approval;

(d) Invoice each producer for their department-approved producer share cost for the product stewardship program, each producer must pay their invoiced amount within sixty days of receipt of the invoice; and

(e) Remit to the department the sum total of the department's annual fee from all participating producers; this fee is due on the first of January for each year of implementation.

(3) Producers may request department review of their producer share cost assessment:

(a) The producer must pay the total invoiced amount to the stewardship organization within sixty days of receipt of the

invoice.

(b) The producer may submit a written request to the director of the department to review the producer share cost assessment:

(i) The request for review must be delivered to the department within fourteen calendar days of the date on the invoice.

(ii) The written request must explain why the estimate is unreasonable based on the evidence available to the product stewardship program and the department.

(iii) Within thirty calendar days of receipt of the written request in (b)(i) of this subsection, the director or the director's designee will review the request.

(iv) The director may request a revision of producer share cost assessments if the producer request is determined to be correct:

(A) Stewardship organizations must recalculate the producer share cost assessment for each producer to be approved by the department; and

(B) Once the recalculated producer share costs are approved by the department, the stewardship organization must send refunds or assess additional charges to plan participants per the revision.

(4) Stewardship organizations for a plan must begin implementation of the plan no later than January 1st of the calendar year following approval of the plan by the department.

(5) Stewardship organizations must implement the approved plan. Updates to the plan will follow the process outlined in WAC 173-910-460.

(6) Stewardship organizations, as agents of their participating producers, are required to:

(a) Annually register producers, collectors, transporters, and processing facilities participating in the stewardship plan and report this information to the department.

(i) Registration includes documentation that each producer, collector, transporter, and processing facility is meeting the requirements of this chapter.

(ii) Provide regular updates to the department for producers, collectors, transporters, and processing facilities participating in the plan.

(b) Submit a product stewardship plan and required plan updates to the department as required in WAC 173-910-440.

(c) Annually report to the department as required in WAC 173-910-430.

(d) Monitor the compliance of all parties participating in the stewardship plan and report compliance issues to the department.

(e) Finance all administrative and operational costs associated with their program, including collection, transport, and processing of mercury-containing lights and the department's annual fee for all participating producers.

(f) Finance the costs of transporting and processing mercury-containing lights from accumulation points for curbside and mail-back collection programs.

(7) In the event that there is more than one approved product stewardship plan, each stewardship organization operating a department-approved product stewardship plan must recover their

share of mercury-containing lights based on the combined market share of all producers participating in the stewardship organization's approved plan.

(8) The department will determine market share for stewardship organizations in the event that there is more than one approved product stewardship plan.

(9) Stewardship organizations must collaborate with state government, local governments, electric utilities, retailers, collectors, transporters, processing facilities, and citizens in the development and implementation of public education, outreach, and marketing efforts. Education and outreach efforts include, but are not limited to:

(a) Development of a program web site and social media services;

(b) Providing point of sale educational materials, like posters and brochures; and

(c) Publishing media releases in print, radio, and television.

(10) All mercury-containing lights collected by a product stewardship program or other collection programs must be recycled.

(11) If the department determines a stewardship organization is out of compliance with the requirements of the plan, the department will document each violation and follow the procedures in WAC 173-910-330 and 173-910-340.

(12) Stewardship organizations submitting information to the department may request confidential treatment under RCW 43.21A.160.

#### NEW SECTION

**WAC 173-910-320 Stewardship collection system.** (1) Stewardship organizations must work with the department, local government officials, retailers, electric utilities, and citizens to establish a convenient collection system for covered entities to deliver their mercury-containing lights into the program.

(2) Convenient collection service will:

(a) County: Provide collection services for mercury-containing lights for each county of the state;

(b) City: Provide additional collection services in each city or town with a population greater than ten thousand; and

(c) Rural: Consult with rural counties that do not have logical in-county collection sites to provide convenient alternative arrangements.

(3) This system may provide collection through:

(a) The nearest commercial centers, solid waste sites, retail businesses, household hazardous waste, or other facilities;

(b) Collection events;

(c) Curbside collection, a premium service;

(d) Mail-back service, a premium service; or

(e) A combination of these options.

(4) Stewardship organizations must register collectors and

provide updated collector information to the department, including:

(a) Contact information, including site name, operator name, physical address, telephone number, and hours of operation;

(b) Identify prospective collection sites not approved to participate in the program. Provide copies to the department of all written correspondence related to prospective collection sites that were not approved. Notify the department, within five days of denial of a prospective collection site, including the reason for denial.

(5) Each collection site or service must accept up to fifteen mercury-containing lights from covered entities at no charge, except for premium services, when lights are dropped off or delivered.

(6) Each collection site or service must:

(a) Comply with WAC 173-303-573 as small quantity handlers of universal waste for lamps;

(b) Collect and store mercury-containing lights in a structurally sound container that, when sealed, is designed to prevent the escape of mercury into the environment by volatilization or any other means;

(c) Have a spill and release response plan that describes the materials, equipment, and procedures that will be used to respond to any mercury release from a mercury-containing light; and

(d) Have a worker safety plan that describes the handling of the mercury-containing lights at the collection location and the measures that will be taken to protect worker health and safety.

(7) All mercury-containing lights collected by a product stewardship program must be recycled.

#### NEW SECTION

**WAC 173-910-330 Stewardship organization violation and warning.** (1) There are two types of stewardship organization violations:

(a) Implementation violation for not implementing an approved product stewardship plan.

(b) Plan/report violation for not submitting a product stewardship plan, plan update or annual report.

(2) Department issued warning letters will:

(a) Be issued for either of the two stewardship organization violations, except that a penalty may be issued for a first implementation violation concurrent with a warning letter.

(b) Be sent to the stewardship organization by certified mail.

(c) Include a copy of the requirements to let the stewardship organization know what they must do to be in compliance with this chapter.

(d) Include the time period within which the stewardship organization must be in compliance in order to not incur a penalty.

#### NEW SECTION

##### **WAC 173-910-340 Stewardship organization penalty and appeal.**

(1) Stewardship organizations that fail to implement their program or submit a plan, updated plan, or annual report, or that fail to comply with a warning letter, will receive penalties in the amounts provided in WAC 173-910-230 multiplied by the number of producers participating in the stewardship organization.

(2) The department will deposit all penalties collected under this section into the mercury-containing lights recycling account created under chapter 70.275 RCW.

(3) To correct a violation the stewardship organization must:

(a) Meet the requirements in the warning or penalty letter from the department; and

(b) Pay any penalties due to the department.

(4) If the stewardship organization, as the agent of its member producers, does not pay the penalties issued against it when due to the department, each participating producer will be responsible for its share of the total penalties.

(5) Penalties applied to the producers in WAC 173-910-230 for the same violation will not also be applied to stewardship organizations.

(6) Penalties may be appealed to the pollution control hearings board, pursuant to chapter 43.21B RCW.

#### **PLAN AND REPORT REQUIREMENTS**

#### NEW SECTION

**WAC 173-910-410 Product stewardship plans.** (1) Stewardship organizations must submit the proposed product stewardship plan to the department by January 1st of the year prior to the planned calendar year when the plan will be implemented. See WAC 173-910-420 for plan content.

(2) Product stewardship plans must provide a program for the collection, transportation, and processing of mercury-containing lights from covered entities in Washington state.

(3) The product stewardship plan must meet the content requirements of WAC 173-910-420.

(4) Prior to implementation, the plan must be approved by the department.

(5) Stewardship organizations must be authorized to submit and implement the plan for each participating producer.

#### NEW SECTION

**WAC 173-910-420 Plan content.** Product stewardship plans must contain the following information:

(1) **Overall plan requirements:** The plan must include:

(a) Names and contact information for all participating producers, including names of brands or brand labels used by specific producers;

(b) The number of mercury-containing lights sold annually in or into the state by producers participating in the plan;

(c) The types of mercury-containing lights that the program will accept; and

(d) Details on the management and organization of the stewardship organization.

(2) **Description of the financing system:** The plan must include a description of how the program will be funded by the producers and how compensation is paid to collectors, transporters, and processing facilities for all services provided to a plan and that payments to service providers will be made within an appropriate period of time from date of shipment or other time frame defined in contractual arrangements. Stewardship organizations will:

(a) Provide confirmation that revenues and expenditures applicable to this program will be allocated in accordance with generally accepted accounting principles (GAAP).

(b) Commit to providing an annual financial audit of the stewardship organization conducted by an independent certified public accountant.

(3) **Use of Washington state businesses:** The plan must explain how it seeks to use businesses within the state, including utilities, retailers, charities, household hazardous waste facilities, processing facilities, recycling facilities, and collection and transportation services for implementation of the plan including existing curbside collection services and existing mail-back services for implementation of the plan.

(4) **Plan goals:** The plan will provide goals for the collection of mercury-containing lights for five years of operation, including:

(a) Total number of mercury-containing lights sold in or into the state;

(b) An estimate of the amount of mercury-containing lights available for collection from covered entities; and

(c) Annual program goals for collection of mercury-containing

lights from covered entities for the next five years.

(5) **Collectors:** The plan must include the following information about collectors participating in the plan:

(a) The type of collection services in the plan, including curbside collection activities, household hazardous waste facilities, drop-off locations, collection events, and accumulation points for curbside or mail-back collection;

(b) Registration information for collectors participating in the plan as required in WAC 173-910-520(1), including accumulation points used for curbside or mail-back collection;

(c) A written statement from each collector ensuring that the collector will comply with the requirements in WAC 173-910-520;

(d) A statement that collection sites will be:

(i) Staffed during operating hours; and

(ii) Open during regularly scheduled hours and on an ongoing basis.

(e) A description of the consideration given to existing residential curbside collection infrastructure and mail-back systems as appropriate collection mechanisms;

(f) A statement identifying how quickly collection containers will be provided once containers reach capacity;

(g) A description of the communication and outreach process to answer questions, provide supplies, or provide technical assistance to collectors;

(h) A description of the technical assistance to be provided to collection sites, including written instructions on how to participate in the program and how to appropriately handle and store mercury-containing lights;

(i) A description of the packaging and shipping materials that will be used when collecting, accumulating, storing, and transporting mercury-containing lights to minimize the release of mercury into the environment and to minimize breakage; and

(j) Drafts of spill and release response plan and worker safety plan required in WAC 173-910-520.

(6) **Transporters:** The plan must include information about transporters participating in the plan, including:

(a) Registration information for transporters participating in the plan, including names, addresses, and contact information.

(b) A written statement from each transporter ensuring that the transporter will comply with the requirements in WAC 173-910-530.

(7) **Processing facilities:** The plan must include information about processing facilities participating in the plan, including:

(a) Registration information for processors participating in the plan, including names, addresses, contact information and hours of operation;

(b) A description of the methods used to process mercury-containing lights at each processing facility in the program; and

(c) Compliance audit reports for each processing facility participating in the plan completed by a qualified third party. The compliance audit will research, review, and report on the following:

(i) Compliance with all federal, state, and local requirements and, if it exports, those of all transit and recipient countries that are applicable to the operations and transactions in which it engages related to the processing of mercury-containing lights, components, parts, and materials and disposal of residuals. These include, but are not limited to, applicable legal requirements relating to:

(A) Waste and recyclables processing, storage, handling, and shipping;

(B) Air emissions and waste water discharge, including storm water discharges;

(C) Worker health and safety; and

(D) Transboundary movement of mercury-containing lights, components, materials, waste, or scrap for reuse, recycling, or disposal.

(ii) Information on financial penalties, regulatory orders, or violations the processing facility received in the previous three years; and

(iii) Any other information requested by the department.

(8) **Recordkeeping:** The plan must include procedures for how the stewardship organization will collect and maintain records to meet and demonstrate compliance with the recordkeeping requirements of this chapter. At a minimum, the stewardship organization will track the following information:

(a) Total number of mercury-containing lights sold in or into Washington state for all producers participating in the plan.

(b) The types of mercury-containing lights collected by the program.

(c) List of all collection sites and collection services, including curbside and mail back.

(d) Identification of transporters and processing facilities participating in the plan.

(e) Mercury-containing lights collected, transported, and processed for the plan, including:

(i) Total mercury-containing lights, by weight in pounds, collected from individual collection sites, collection services, curbside and mail back.

(ii) Final destination and quantities of lights processed and disposed.

(f) Education efforts for consumers, retailers, utilities, collectors, transporters, and processors, including assessments of the effectiveness of these efforts.

(g) Efforts to promote the mercury-containing lights collection program.

(9) **Implementation timeline:** The plan must include a timeline showing when each of the following will occur and a detailed description of each activity including, but not limited to:

(a) Start-up of the collection and processing efforts;

(b) Education efforts for consumers, retailers, collectors, transporters, and processors;

(c) Outreach efforts for the mercury-containing lights collection program; and

(d) Continual progress toward collection of spent mercury-containing lights.

(10) **Education, public outreach, and marketing:** A description of how the plan will meet the public education, outreach and marketing requirements, including:

(a) How it will provide information about where and how to deliver their mercury-containing lights to a product stewardship program collector at the end of the product's life;

(b) Providing a web site and toll-free number that gives information about the product stewardship program in sufficient detail regarding how and where to drop off mercury-containing lights into the product stewardship program, and collaborating with the department to provide information necessary to keep the 1-800-RECYCLE on-line data base up to date;

(c) Describing the outreach method or methods used;

(d) How it will ensure outreach to the public throughout the state;

(e) How it will provide outreach materials for educating the public to all collectors used by the plan;

(f) Explaining how the plan will coordinate education, public outreach, and marketing with other approved product stewardship plans;

(g) Explaining how the plan will coordinate on education, public outreach, and marketing with retailers, distributors, wholesalers, and electric utilities; and

(h) Explain the public review process implemented by the stewardship organization, the public comments received by the stewardship organization, and how the stewardship organization addressed those comments.

(11) **Other information** deemed necessary by the department to determine compliance with this chapter.

(12) Producers submitting information to the department may request confidential treatment under RCW 43.21A.160.

#### NEW SECTION

**WAC 173-910-430 Annual reports.** On June 1st of each program year each stewardship organization must file an annual report with the department for the preceding calendar year's program. The department will review the report and notify the stewardship organization of any deficiencies that need to be addressed. The annual report must include the following information:

(1) **Contact information:** Identify the stewardship organization and the producers participating in the program, including any updated contact information. The list of producer brands sold in or into the state. The total number of mercury-containing lights sold in or into the state by participating producers in the previous year.

(2) **Executive summary:** Provide a description of the mercury-containing lights collection and recycling efforts during the reporting period. Include anticipated steps, if needed, to improve performance and a description of challenges encountered during the reporting period and how they will be addressed.

(3) **Program description:** Summarize the mercury-containing lights product stewardship program, providing details on the collection, transport, and recycling of mercury-containing lights.

(4) **Program goals:** State the goals from the plan, the baseline from which goals were measured, and report on achievement during the reporting period, including:

(a) Describe any adjustments to goals stated in the approved stewardship plan for the upcoming reporting period and accompanying rationale for those changes.

(b) Describe how the program met its goal for the collection of unwanted mercury-containing lights and, if not, what changes have been made or will be made in the next year to meet its goal.

(c) Identify the total mercury-containing lights, by weight in pounds, collected for the preceding program year including documentation verifying collection and processing of that material, including mercury-containing lights collected, reported by county.

(5) **Collection system:** Names, locations, contact information for collection sites and services operating in the state in the prior program year and the parties who operated them:

(a) In each county;

(b) For each city with a population greater than ten thousand;

(c) For collection events, curbside collection, or mail-back services; and

(d) Total mercury-containing lights, by weight in pounds, received from each collector.

(6) **Processing facility information:** Identify all processing facilities used, including the name, address, and contact information by providing the following:

(a) Total program mercury-containing lights, by weight in pounds, received by each processing facility;

(b) A description of the methods used by each processing facility to process the mercury-containing lights;

(c) Compliance audit reports for each processing facility participating in the plan completed by a qualified third party. The compliance audit will research, review, and report on the following:

(i) Compliance with all federal, state, and local requirements and, if it exports, those of all transit and recipient countries that are applicable to the operations and transactions in which it engages related to the processing of mercury-containing lights, components, parts, and materials and disposal of residuals. These include, but are not limited to, applicable legal requirements relating to:

(A) Waste and recyclables processing, storage, handling, and shipping;

(B) Air emissions and waste water discharge, including storm water discharges;

(C) Worker health and safety; and  
(D) Transboundary movement of mercury-containing lights, components, materials, waste, or scrap for reuse, recycling, or disposal.

(ii) Information on financial penalties, regulatory orders, or violations the processing facility received in the previous three years; and

(iii) Any other information requested by the department.

(7) **Education and outreach:** Efforts that were undertaken by the stewardship organization regarding how and where to drop off mercury-containing lights into the product stewardship program. Include an assessment of the effectiveness of these efforts and changes to be implemented in the next year.

(8) **Financial report:** Financial audit reports for the stewardship organization completed by a qualified third party.

(9) **Other information** deemed necessary by the department to determine compliance with this chapter.

(10) Stewardship organizations submitting information to the department may request confidential treatment under RCW 43.21A.160.

#### NEW SECTION

**WAC 173-910-440 Plan and report submittal.** (1) Plans must include the plan content requirements in WAC 173-910-420.

(a) New product stewardship plans must be submitted by January 1st for implementation in the following calendar year.

(b) The first update of an approved product stewardship plan is required two years after approval and implementation, by July 1st of the second year of implementation.

(c) Second and subsequent updates of an approved product stewardship plan are required every four years, by July 1st of each subsequent third year of implementation.

(d) The department will post product stewardship plans and updates on the department's web site for public review. The department will provide public review comments to the stewardship organization.

(2) Annual reports must include the content requirements in WAC 173-910-430.

(a) Annual reports must be submitted by June 1st for the prior calendar year.

(b) The department may request additional information or clarification during the review of annual reports. If the department determines that additional information is needed, the stewardship organization must submit the additional information to the department within sixty days of receipt of the notice.

(c) The department will post annual reports on the department's web site for public review.

(3) Stewardship organizations must submit one electronic copy

of their plan, update, or report to the department. The plan, update, or report must be submitted to the Waste 2 Resources Program at the department's headquarters office.

(4) Stewardship organizations submitting information to the department may request confidential treatment under RCW 43.21A.160.

(5) The department may request a hard copy version of the plan or report.

**Table 400**  
**Plan and Report Submittal Timeline**

Entity	Plan	Plan Update	Annual Report
<i>Timing</i>	<i>For the following calendar year</i>		<i>For the prior calendar year</i>
Stewardship organization submits document	January 1st	July 1st	June 1st
Department initial review	90 days	90 days	60 days
Stewardship organization document revision	60 days	60 days	60 days
Department second review	60 days	60 days	60 days
Stewardship organization resubmits document	60 days	60 days	60 days
Until approved, document review timing follows the second review schedule			

#### NEW SECTION

**WAC 173-910-450 Plan review and approval.** (1) The department will post stewardship plans on the department's web site to allow public review and comment.

(2) Within ninety days after receipt of a complete plan, the department will determine whether the plan complies with this chapter.

(3) The department will determine if the plan is:

(a) **Approved.** If approved, the department will send a letter of approval to the stewardship organization via certified mail. The approval letter will include an expiration date for the plan, either after two years, for initial plans, or four years, for updated plans, from approval.

(b) **Disapproved.** If disapproved, the department will send a letter of disapproval to the stewardship organization via certified mail. The disapproval letter will provide the department's reasons for not approving the plan.

(i) The stewardship organization must submit a new or revised

plan within sixty days after receipt of the disapproval letter.

(ii) The department will have an additional sixty days to review the new or revised plan.

(4) The department will consider the following when reviewing a plan for approval:

(a) The plan met the submittal dates;

(b) The plan meets all the requirements in this chapter and provides descriptive information sufficient to allow the department to determine that the implementation of the plan will be in compliance with this chapter;

(c) When reviewing a plan for service level, the department may contact the local governments or communities identified in the plan; and

(d) The plan, when implemented, would meet or exceed required collection service levels (see WAC 173-910-320).

(5) The department may request additional information or clarification during the review of a plan. If the department determines that additional information is needed, the stewardship organization must submit the additional information to the department within sixty days of receipt of the notice.

(6) Stewardship organizations may request portions of the plan be exempted from public disclosure in accordance with RCW 42.56.270.

#### NEW SECTION

**WAC 173-910-460 Plan updates.** (1) Stewardship organizations operating a product stewardship program must update product stewardship plans by July 1st for the upcoming implementation calendar year and submit the updated plan to the department for review and approval.

(2) Plan updates are required two years after start up, once every four years thereafter, or as needed due to program changes. Examples of program changes that could require an unscheduled plan update include:

(a) Addition or deletion of producers;

(b) Significant changes in collection service;

(c) Revision of the plan goals or schedule; or

(d) Change in processors used by the plan.

(3) Failure to provide service means implementation of the plan fails to do any of the following:

(a) Provide service in each county in the state;

(b) Provide service in each city or town with a population of ten thousand or greater; or

(c) Meet other plan requirements.

(4) Failure to provide service is a stewardship organization implementation violation. The department will document the violation and follow the procedures in WAC 173-910-330 and 173-910-340.

## SERVICE PROVIDER REQUIREMENTS

### NEW SECTION

**WAC 173-910-510 Service provider requirements.** (1) Beginning January 1, 2013, service providers participating in a mercury-containing lights product stewardship program approved by the department must comply with the requirements of this chapter.

(2) Service providers participating in the stewardship program that must comply with these requirements include collectors, transporters, and processing facilities.

### NEW SECTION

**WAC 173-910-520 Collector requirements.** (1) Collectors participating in a product stewardship program including, but not limited to, collection sites, curbside services, mail-back services, accumulation points, and collection events, must register with the stewardship organization. Collector registration information must include:

(a) The legal name of the person owning and operating the collection location;

(b) The address of the collection location;

(c) The phone number of the collection location;

(d) The name, address, and phone number of the individual responsible for operating the collection location; and

(e) Updates of any changes in this information within thirty days of the change.

(2) Mercury-containing lights collected for a plan must be collected free of charge except for premium services.

(3) Mercury-containing lights premium services provide collection and transport of mercury-containing lights from point of collection to product stewardship program accumulation points. For premium services participating in the product stewardship program, the stewardship organization must pay the cost of transporting mercury-containing lights from accumulation points to the processing facility and the cost of processing the mercury-containing lights. Premium services include, but are not limited to:

(a) Curbside collection of mercury-containing lights, which may include additional fees to cover the costs not paid by the product stewardship program.

(b) Mail-back collection of mercury-containing lights, which may include additional fees to cover the costs not paid by the product stewardship program.

(4) Collectors participating in a product stewardship program may include collection events that:

(a) Service rural communities that do not have a continually staffed collection site;

(b) Are registered with the stewardship organization; and

(c) Meet the requirements of this section.

(5) Collectors of mercury-containing lights will not process the collected lights unless they also meet the processing facility requirements in WAC 173-910-540.

(6) Collectors must comply with WAC 173-303-573 as small quantity handlers of universal waste as well as all other applicable laws, rules, and local ordinances.

(7) When providing collection services for a plan, each collector, including collection sites, curbside collection, mail-back service, accumulation points, and collection events must:

(a) Staff the site during operating hours;

(b) Notify the stewardship organization of changes in hours and days of operation;

(c) Handle mercury-containing lights in a way that prevents releases of mercury to the environment;

(d) Have a spill and release response plan that describes the materials, equipment, and procedures that will be used to respond to any mercury release from a mercury-containing light;

(e) Have a worker safety plan that describes the handling of the mercury-containing lights at the collection location and the measures that will be taken to protect worker health and safety;

(f) Use packaging and shipping material that will minimize the release of mercury into the environment by volatilization or any other means and minimize breakage; and

(g) Submit all mercury-containing lights collected from covered entities to a department-approved product stewardship program.

(8) A collector must allow the department access for inspections to determine compliance with the requirements in this chapter.

(9) No entity may claim to be collecting mercury-containing lights for a plan unless the entity is registered with the stewardship organization as a collector and submits all collected mercury-containing lights to the transporters and processors identified in the plan.

(10) Any collector found to be out of compliance with this section or the requirements of the plan will not be allowed to participate in the program.

#### NEW SECTION

**WAC 173-910-530 Transporter requirements.** (1) All transporters of mercury-containing lights must comply with all applicable laws, rules, and local ordinances.

(2) Transporters participating in a product stewardship program must register with the stewardship organization as required in WAC 173-910-310 of this chapter.

(3) Transporters must allow access to the department for purposes of ensuring compliance with this chapter.

(4) Transporters must deliver mercury-containing lights for recycling to processing facilities participating in the product stewardship plan.

(5) Any transporter found to be out of compliance with this section or the requirements of the plan will not be allowed to participate in the program.

#### NEW SECTION

**WAC 173-910-540 Processing facility requirements.** (1) Processing facilities must operate their facility in a way that protects human health and the environment.

(2) Processing facilities must comply with all federal, state, and local requirements and, if it exports, those of all transit and recipient countries that are applicable to the operations and transactions in which it engages related to the processing and disposal of mercury-containing lights, parts of the mercury-containing lights, or mercury from the mercury-containing lights. These include, but are not limited to, applicable legal requirements relating to:

(a) Waste and recyclables processing, storage, handling, and shipping;

(b) Air emissions and waste water discharge, including storm water discharges;

(c) Worker health and safety; and

(d) Transboundary movement of materials, waste, or scrap for recycling or disposal.

(3) Processing facilities must be open and transparent concerning compliance with all federal, state, and local requirements. Upon request by the department, person, or individual, a processing facility must make information available about any financial penalties, regulatory orders, or violations received in the previous three years. If the processing facility receives subsequent penalties or regulatory orders, the processing facility must make that information available to the requestor within sixty days after any subsequent penalties or regulatory orders are issued.

(4) Processing facilities participating in a product

stewardship program must register with the stewardship organization as required in WAC 173-910-310.

(5) Processing facilities must allow access to the department for purposes of ensuring compliance with this chapter.

(6) Processing facilities may not use federal or state prison labor for processing mercury-containing lights.

(7) Any processing facility found to be out of compliance with this section or the requirements of the plan will not be allowed to participate in the program.

#### **RETAILER, WHOLESALER, DISTRIBUTOR, OR ELECTRIC UTILITY REQUIREMENTS**

#### **NEW SECTION**

**WAC 173-910-610 Participation requirements.** (1) Retailers, wholesalers, distributors, electric utilities, or other persons that give away, offer for sale, or sell, including internet sales, mercury-containing lights in or into the state for residential use must comply with the requirements of this section.

(2) Beginning January 1, 2013, mercury-containing lights offered for sale or distributed in or into the state for residential use must be obtained from producers participating in a product stewardship plan approved by the department.

(a) The department will maintain a list of compliant producers on its web site.

(b) Retailers, wholesalers, distributors, or electric utilities are required to regularly check this list of compliant producers to ensure sales and distribution of compliant product.

(3) Retailers, wholesalers, distributors, or electric utilities must only sell or offer for sale or distribute mercury-containing lights from compliant producers. Existing stock of mercury-containing lights in possession on January 1, 2013, may be sold or distributed even if the producer of the mercury-containing light is not in compliance.

(4) After January 1, 2013, the department may inspect mercury-containing lights inventory offered for sale or distributed in or into Washington state to determine if the requirements in this chapter are met.

(5) Education and outreach: Retailers, wholesalers, distributors, or electric utilities that sell, offer for sale or distribute mercury-containing lights must work with stewardship organizations to:

(a) Ensure distribution of mercury-containing lights in or

into Washington state is from producers participating in the product stewardship program; and

(b) Provide information to consumers and customers describing where and how to return mercury-containing lights to the product stewardship program and opportunities and locations for the convenient collection or return of the products at the point of sale. This outreach may include:

(i) Use of artwork in advertisements such as on flyers, shelf-tags, or brochures for this program.

(ii) The stewardship organization's toll-free telephone number and web site.

(iii) Information about how to return mercury-containing lights to the product stewardship program in Washington state either in, on, or with the packaging.

(c) Provide information in a visible location on their web site.

#### NEW SECTION

**WAC 173-910-620 Violation and warning.** (1) A retailer, wholesaler, distributor, or electric utility is in violation of this chapter when selling or distributing mercury-containing lights from a noncompliant producer.

(2) A violation occurs for every day of noncompliance with the requirements.

(3) Department issued warning letters will:

(a) Be issued for violations.

(b) Be sent by certified mail.

(c) Include a copy of the requirements to let the recipient know what they must do to be in compliance with this chapter.

(d) Include the time period within which the recipient must be in compliance in order to avoid a penalty.

#### NEW SECTION

**WAC 173-910-630 Penalty and appeal.** (1) Penalties apply when a retailer, wholesaler, distributor, or electric utility fails to come into compliance with this chapter.

(2) Failure to comply with the warning letter within sixty days will result in a penalty of up to five hundred dollars for each violation; a violation is one day of noncompliance.

This penalty will be waived if the distribution or sale of mercury-containing lights is discontinued within thirty days of the date the penalty was assessed.

(3) The department will deposit all penalties collected under this section into the mercury-containing lights recycling account created under chapter 70.275 RCW.

(4) To correct a violation the recipient must:

(a) Meet the requirements in the warning or penalty letter from the department; and

(b) Pay any penalties due to the department.

(5) Penalties may be appealed to the pollution control hearings board, pursuant to chapter 43.21B RCW.

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY	
	Plaintiff/Petitioner,
vs.	
	Defendant/Respondent

NO. 12-2-02623-5

NOTICE OF ASSIGNMENT/ (NTAS)  
NOTICE OF SCHEDULING CONFERENCE

TO: THURSTON COUNTY CLERK  
ATTORNEYS/LITIGANTS

PLEASE TAKE NOTICE:

1. That the above-noted case is assigned to:

**The Honorable Gary Tabor**

2. That the Scheduling Conference is scheduled for 9:00 a.m March 22, 2013.

Dated this 20th day of December, 2012.

*All parties should be familiar with Local Civil Rule 3(f) which requires in part that parties or lead counsel attend and that the parties or counsel shall communicate with each other concerning the case schedule order before the scheduling conference.*

THURSTON COUNTY SUPERIOR COURT  
2000 LAKERIDGE DRIVE SW  
OLYMPIA WA 98502  
(360) 786 - 5560

NOTICE OF ASSIGNMENT/  
NOTICE OF SCHEDULING CONFERENCE